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# EU update

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A B S T R A C T

This is the latest edition of the DLA Piper column on developments in EU law relating to IP, IT and telecommunications. This news article summarises recent developments that are considered important for practitioners, students and academics in a wide range of information technology, e-commerce, telecommunications and intellectual property areas. It cannot be exhaustive but intends to address the important points. This is a hard copy reference guide, but links to outside web sites are included where possible. No responsibility is assumed for the accuracy of information contained in these links.



## 1. Media

### 1.1. *ECJ rules on TV advertising practices*

***Florence Guthfreund-Roland**, Partner and **Mathilde Hallé**, Consultant*

The European Court of Justice (the "ECJ") recently ruled on the interpretation of the provisions of the Audiovisual Media Service Directive[1] (the "Directive") relating to television advertising and commercial sponsorship in the Sanoma case.[2]

At stake were the broadcasting practices implemented by Sanoma, a Finnish television broadcaster, which the Finnish Communications Regulatory Authority (the "Authority") considered to be infringing the national legal provisions implementing the Directive. More specifically, Sanoma split the television screen into two parts at the end of its programmes: one displaying the preceding programmes' closing credits, and the other one presenting the upcoming programme. In addition, some of its programmes were sponsored; sponsor logos were often displayed at times other than during when the sponsored programmes were being broadcast. Furthermore, Sanoma did not include "black seconds" breaks between advertising spots within the total amount of time dedicated to advertising. After receiving an order from the Authority, Sanoma filed a petition before the Finnish Administrative Court of Helsinki against the Authority's decision. The Court confirmed the decision, and Sanoma filed an appeal before the Supreme Administrative Court of Finland, which decided to defer to the ECJ for clarification on how to interpret the Directive.

- The first question asked to the ECJ was whether a split screen that shows the closing credits of a television programme in one column and a list presenting the broadcaster's upcoming programmes in another column was an appropriate means of separation between the audiovisual programme itself and the advertising. According to Article 19 par. 1 of the Directive, television advertising and teleshopping must be (i) readily recognisable, and (ii) distinguished from editorial content. The ECJ held that the Directive must be interpreted as not precluding national legislation allowing a split screen between the programme and the advertising for the upcoming programmes provided that such a means of separation meets the requirements listed

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[1] Directive No. 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services.

[2] Case C-314/14, Sanoma Media Finland Oy – Nelonen Media.

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above, a matter which is for the referring court to establish. It is worth noting that the ECJ did not follow the General Advocate's opinion that there should be additional visual or audio warnings to inform the public that the second column of the screen is actually advertising.

- The second question asked to the ECJ was whether the Directive must be interpreted as precluding sponsorship signs shown in programmes other than the sponsored programme itself from being included in the maximum time for the broadcasting of advertising per clock hour. Pursuant to Article 10 of the Directive, viewers shall be clearly informed of the existence of a sponsorship agreement, and sponsored programmes shall be clearly identified as such with the name, logo and/or any other symbol of the sponsor, displayed at the beginning, during and/or at the end of the programmes. Such indications shall not be included in the maximum time for the broadcasting of advertising per clock hour since they are required by law. However, according to the ECJ (and in line with the Advocate General's Opinion), when the sponsorship signs are not displayed in the sponsored programme itself but in other programmes, those signs are to be included in the maximum time for the broadcasting of advertising per clock hour.
- The third and last question asked to the ECJ was whether the "black seconds" in between spots should be included in the maximum time for the broadcasting of television advertising per clock hour, being 20%. Article 23 par. 1 of the Directive states that television advertising and teleshopping spots must not exceed 20% of a clock-hour time. According to the ECJ, the point of setting a maximum time for advertisement broadcasting is to insure that 80% of the whole broadcasting time be devoted to the broadcasting of programmes or other editorial content. Therefore the ECJ not only rules in favour of the inclusion of those "black seconds" in the maximum time for advertisement broadcasting but considers that national law shall not allow for the exclusion of the black seconds in the calculation of such time. Although the Advocate General based its reasoning on distinct considerations relating to the protection of the interests of viewers as consumers, its conclusion was the same as the ECJ's: the "black seconds" should be included in the maximum time for the broadcasting of television advertising per clock hour.

## 2. Data privacy

### 2.1. *EU data protection authorities voice strong concerns about Privacy Shield*

***James Clark**, Associate, DLA Piper Leeds*

The Article 29 Working Party ("WP29"), which comprises the national data protection authorities of the EU member states, issued a statement on Wednesday strongly criticising the draft "EU – US Privacy Shield" proposal. Privacy Shield is intended to be the replacement to the defunct Safe Harbor scheme, which allowed EU companies to legally export personal data to the US.

Whilst WP29 accepts that, in its current form, Privacy Shield represents a significant improvement over Safe Harbor, it believes it does not go far enough in offering EU citizens an adequate level of protection for their personal information. Crucially, WP29 considers that Privacy Shield does not sufficiently address the massive and indiscriminate collection of personal data by the US authorities which was the precipitating factor in the Schrems case which brought down Safe Harbor.

In summary, the specific criticisms voiced by WP29 are:

- Lack of clarity – Privacy Shield is comprised of various documents and annexes, making information hard to find and at times inconsistent;
- Lack of key data protection principles – some of the central principles of European data protection law, such as purpose limitation and data retention, are not sufficiently covered by the proposal;
- Onward transfers – the proposal does not ensure that the same standards are applied by third country recipients who receive EU personal data from a Privacy Shield entity;
- Complex redress mechanism – EU citizens may not be able to effectively defend their rights in the face of a complex recourse mechanism which for many will be in a different language;
- Indiscriminate data collection – there is insufficient detail about how the massive and indiscriminate surveillance of individuals by US authorities will be curtailed. In WP29's view, such surveillance can never be considered proportionate or necessary;
- Ombudsperson not independent – WP29 welcomes the creation of an Ombudsperson role to handle and solve complaints raised by EU citizens. However, it is concerned that this role will not be sufficiently independent from US authorities.

The statement also concluded that, even if Privacy Shield is approved as an adequate mechanism for data transfers under current legislation, a review of its efficacy will be needed following the entry into application of the General Data Protection Regulation ("GDPR") in 2018. This appears to be a strong hint from WP29 that in its current form, Privacy Shield would almost certainly not be GDPR compliant.

As the Privacy Shield proposal is still being finalised, WP29's assessment is not fatal. However, it is a clear signal to the EU Commission and to their partners in the US that significant improvements are needed if the scheme is to earn the adequacy decision which will make it a legal mechanism for data transfers.

In the meantime, WP29 has repeatedly stated that Binding Corporate Rules and the EC standard contractual clauses (or 'model clauses') can be relied upon for data transfers, and represent a safe alternative for former Safe Harbor companies. Although both of these schemes will be reviewed by WP29 in due course, it will not make any decision about them until after Privacy Shield has been dealt with.

### 2.2. *Does the use of ad-blocker detectors breach the e-Privacy Directive?*

***James Clark**, Associate, DLA Piper Leeds*

Online advertising has become increasingly sophisticated in recent years, progressing from text, to flash animations, to